Supreme Court, U. S.
FILED
APR 23 1980
ROBERT L. STOAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1980

No. 79-1677

STATE OF CALIFORNIA,

Petitioner,

v.

NICK RAMON VELASQUEZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Attorney General
of the State of California
ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General — Criminal Division
S. CLARK MOORE,
Assistant Attorney General
NORMAN H. SOKOLOW,
Deputy Attorney General
HOWARD J. SCHWAB,
Deputy Attorney General

3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2212

Attorneys for Petitioner

Westside Law Publishers Santa Monica, California (213) 450-1965

TOPICAL INDEX

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Statement Of The Case 5

Statement Of Facts Relative To Excusal Of Prospective Juror Maureen Rundee 11

Reasons Why A Writ Of Certiorari Should Be Granted

I.

The Excusal Of Prospective Juror Maureen Rundee For Cause Was Proper Under Witherspoon v. Illinois, Supra, (1968) 391 U.S. 510 18

II.

Failure To Object Waives Alleged Witherspoon Error 22

III.

Any Alleged Witherspoon Error Is Harmless Where After The Completion Of Jury Selection, The Prosecution Has Twenty-Five Unused Peremptory Challenges 26

Conclusion 29

Appendix A 31

Appendix B 61

TABLE OF AUTHORITIES

Cases — **Page**

Alexander v. United States (1891) 138 U.S. 353 ... 23
Buffalo Forge Co. v. Steelworkers (1976) 428 U.S. 397 ... 25
Boulden v. Holman (1969) 394 U.S. 478 ... 23
Boulden v. State (1965) 179 S.2d 20 ... 23
Boulware v. State (1977) 542 S.W.2d 677 ... 25
California v. Velasquez, 48 U.S.L.W. 3626 (March 24, 1980) ... 1, 11
Clark v. State (Ark. 1978) 573 S.W.2d 622 ... 25
Conn. Mut. Life Ins. Co. v. Hillmon (1903) 188 U.S. 208 ... 28
Davis v. Georgia (1976) 429 U.S. 122 ... 27, 28
Davis v. United States (1973) 411 U.S. 233 ... 25
Francis v. Southern Pacific Co. (1948) 333 U.S. 445 ... 23
Harris v. State (1971) 457 S.W.2d 903 ... 23
Harris v. Texas (1971) 403 U.S. 947 ... 23
In re Anderson (1968) 69 Cal. 2d 613 ... 24
Maxwell v. Bishop (1970) 398 U.S. 262 ... 23
Parker v. Illinois (1948) 333 U.S. 571 ... 23
People v. Risenhoover (1968) 70 Cal. 2d 39 ... 24
People v. Velasquez (1980) 26 Cal. 3d 425 ... 2, 5, 11, 19, 21, 22, 24, 25, 26
Queenan v. Oklahoma (1903) 190 U.S. 548 ... 23, 24, 25
Shippy v. State (1977) 556 S.W.2d 246 ... 25
State v. Wigglesworth (1969) 248 N.E.2d 607 ... 23
United States v. Dionisio (1972) 410 U.S. 1 ... 25
Von Byrd v. State (1979) 569 S.W.2d 569 ... 25
Wigglesworth v. Ohio (1971) 403 U.S. 947 ... 23
Witherspoon v. Illinios (1968) 391 U.S. 510 ... 2, 11, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28

Statutes

California Penal Code
§ 190.2 ... 3
§ 1070(a) ... 4, 17, 25, 26
§ 1070.5 ... 4, 17, 25, 26
§ 1239(b) ... 5, 10

In the Supreme Court of the United States

October Term, 1980
No. _____

STATE OF CALIFORNIA,

Petitioner,

v.

NICK RAMON VELASQUEZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of California affirming the judgment of guilt but reversing the penalty of death entered on February 1, 1980, with three of the seven Justices voting to affirm the death sentence. A petition for rehearing was denied on February 27, 1980, with three Justices voting to grant. On March 24, 1980, Justice William H. Rehnquist, Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit, granted a stay herein pending the issuance of this Court's opinion in *Adams v. Texas,* No. 79-5175 and the timely filing and disposition of a petition for writ of certiorari. (A-773, *California v. Velasquez,* 48 U.S.L.W. 3626 (March 24, 1980).)

OPINIONS BELOW

The opinion of the California Supreme Court affirming the judgment of guilt but reversing the penalty of death (*People v. Velasquez,* 26 Cal. 3d 425, 162 Cal. Rptr. 306, 606 P.2d 341 (1980)) appears as Appendix A of this petition. A copy of the California Supreme Court's order denying the petition for rehearing without opinion appears as Appendix B of this petition.

JURISDICTION

The judgment of the California Supreme Court was filed on February 1, 1980. A timely petition for rehearing was denied on February 27, 1980. This petition for writ of certiorari was filed within 90 days of that date and therefore timely filed. (*United States v. Healy* (1964) 376 U.S. 75, 77-80, and cases cited.) This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether a prospective juror is improperly removed for cause under *Witherspoon v. Illinois* (1968) 391 U.S. 510, when that individual states that there may be a hypothetical case in which a crime was so heinous that the death penalty could be considered but the prospective juror has not been able to think of a hypothetical of that nature?

2. Whether alleged *Witherspoon* error is waived by a failure of objection by the defense?

3. Whether *Witherspoon* error can be cured if the prosecution fails to utilize all of its peremptory challenges, especially where the prosecution has 25 unused peremptory challenges?

STATUTORY PROVISIONS INVOLVED

Former California Penal Code section 190.2 (which applies to respondent) reads in pertinent part:

> " . . . . The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found, in a proceeding under Section 190.4, to be true:
>
> " . . . .
>
> "(c) The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists:
>
> " . . . .
>
> "(3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:
>
> "(i) Robbery in violation of Section 211;
>
> " . . . .
>
> "(5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second

degree murder shall be deemed to be murder in the first or second degree.

"(d) For the purposes of subdivision (c), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.

. . . "

California Penal Code section 1070(a) reads in pertinent part:

" . . . . If the offense charged be punishable with death, or with imprisonment in the state prison for life, the defendant is entitled to 26 and the state to 26 peremptory challenges . . . . "

California Penal Code section 1070.5 reads:

"(a) Except as provided in subdivision (b), when two or more defendants are jointly tried for any public offense, whether felony or misdemeanor, the state and the defendants shall be entitled to the number of challenges prescribed by Section 1070, which challenges on the part of the defendants must be exercised jointly. Each defendant shall also be entitled to * * * *five* additional challenges which may be exercised separately; the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants.

"(b) When two or more defendants are jointly tried for any offense punishable with a maximum term of imprisonment of 90 days or less, the state and the defendants shall be entitled to the number of challenges prescribed by Section 1070, which challenges on the part of the defendants must be exercised jointly. Each defendant shall also be entitled to four additional challenges which may be exercised separately; the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants . . . . " (Emphasis in original.)

California Penal Code section 1239(b) reads: "(b) When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel . . . ."

STATEMENT OF THE CASE

Respondent hereby adopts the Statement of the Case as set forth in the opinion of the California Supreme Court in *People v. Velasquez,* 26 Cal. 3d 425, 429-432. (Appendix A, pp. 32-37.)

"Defendant Velasquez and codefendant Valencia were charged by information with the murder of Mario Casas. The information alleged, as a special circumstance permitting imposition of the death penalty, that the defendants personally committed a premeditated murder during the commission of a robbery. (See former Pen. Code, § 190.2, subd. (c) (3).) As to defendant Velasquez, the information asserted a second special circumstance: that defendant personally committed the murder and had previously been convicted of second degree murder. (See former Pen. Code, § 190.2, subd. (c) (5).)

The information also charged that in the commission of the murder defendants had used a firearm within the meaning of Penal Code section 1203.06, subdivision (a)(1); at trial the prosecution amended the information to charge firearm use also under section 12022.5.

"Both defendants pled not guilty. Prior to trial, both presented a series of motions. First, they moved to strike the allegation of special circumstances as an abuse of prosecutorial discretion. The court heard testimony from Deputy District Attorney Trott, who explained the basis on which the district attorney decides whether to charge special circumstances, and denied the motion. Defendants further moved in the alternative either for separate guilt and penalty juries or to limit the voir dire of the jurors concerning their views on capital punishment. After a lengthy hearing at which defendants presented expert testimony on the effect upon the jury of excluding persons opposed to the death penalty, the court denied the motion.

"At trial the prosecution proved that the victim, Mario Casas, was an attendant at a Texaco gas station at the corner of Garvey and Delta Streets in Los Angeles. He was killed by a single .22 caliber bullet, fired at a distance of a few feet, which penetrated his lung and the pericardial sac. Death occurred shortly after 10 p.m. on November 3, 1977.

"Earlier that evening defendant was at his mother's home helping Gilbert Seguin paint the kitchen. Valencia arrived there about 8 p.m. and later talked to defendant for about 20 minutes.

About 9:30 defendant and Valencia borrowed Seguin's car to purchase more beer.

"About 10 p.m. Maria Somers and her mother, Josefina Somers, purchased cigarettes at the Texaco station where Casas worked. As they drove from the station they observed Casas struggling with two men. One, whom they identified as Valencia, was holding Casas by the arm and shoulder. The other, whom they could not identify, was holding a gun to the attendant's stomach.

"The Somerses drove away from the station, found a police officer, and returned with him to the station. When they arrived, the two men had left. Casas was lying on the ground, shot, holding the torn half of a dollar bill in his hand. Texaco employees later testified that some of the evening's gas receipts were missing.

"Benjamin Leyva, who lives near the gas station, testified that he heard sounds of scuffling. He looked and saw one man struggling with the attendant while another stood by some distance away. He then heard a shot, and saw the man who had been struggling with the attendant push the attendant away. The attendant fell to the ground; the other man ran to a car, which drove away with the man who had been struggling with the attendant in the passenger's seat. Leyva examined the attendant, decided he was probably dead, and started toward a liquor store to call the police when the officers accompanied by the Somerses arrived.

"A sheriff's deputy testified that between 10 and 11 p.m. he stopped a car matching the

description of the vehicle involved in the gas station robbery. Defendant, the driver, and Valencia emerged and were arrested. A search of the vehicle turned up a .22 caliber pistol which ballistic evidence later showed was the murder weapon. Bills were wrapped around the grip of the pistol and fastened with a rubber band. The officers also discovered an envelope containing 16 $1 bills.

"Both defendants testified. Valencia said that he had shot the attendant after an argument which began when the attendant called him 'stupid' in Spanish. Valencia claimed he had not intended to rob the gas station; the attendant had thrown money in Valencia's face so, after he shot the attendant, he picked up the money and took it. Valencia denied that defendant had anything to do with the killing or robbery; he excused his own participation by claiming to be high on PCP and alcohol at the time. Defendant's testimony, consistent with that of Valencia, was that defendant was merely standing by when Valencia began an argument with the attendant and shot him.

"The evidence thus established without contradiction that defendants were the two persons present at the murder scene. The evidence was in conflict, however, as to who actually shot Casas. The testimony of the Somerses indicated that both defendants participated in the robbery and murder, with Velasquez actually shooting the victim; that of Leyva and the defendants that Valencia shot the attendant with Velasquez an

uninvolved bystander.[2]

"The jury resolved this conflict against defendant Velasquez. It found both defendants guilty of first degree murder, thus rejecting testimony that Velasquez was a mere spectator of the crime. It further found the use of a firearm allegation true as to Velasquez but untrue as to Valencia, a verdict which clearly implies that Velasquez was the one who shot the attendant.

"The special circumstance allegation against defendant Velasquez was based on two grounds. Prerequisite to either ground is a jury finding that 'The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death.' (Former Pen. Code, § 190.2, subd. (c).) The prosecution then alleged, first, that 'The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of . . . Robbery.' (Former Pen. Code, § 190.2, subd. (c) (3).) It further alleged that 'The defendant . . . has been convicted in a prior proceeding of the offense of murder of the first or second degree.'

" [2]The testimony of Maria and Josefina Somers and that of Leyva, although apparently inconsistent, could be reconciled. On the one hand, the Somerses were not present when the shot was fired, so although they saw Velasquez with the gun it would be possible that Valencia fired the shot. On the other hand, Leyva did not testify that Valencia shot Casas, but that when he heard a shot he looked up and saw Valencia push Casas away, and Casas then fell down. That testimony is consistent with the possibility that Valencia was holding Casas when Velasquez shot the attendant.

(Former Pen. Code, § 190.2, subd. (c)(5).) The allegation against Valencia also alleged the special circumstance of premeditated killing in the course of a robbery.

"The prosecution relied on the evidence presented at the guilt phase to show a premeditated killing during the commission of a robbery. To prove defendant's prior murder, the state introduced evidence of his 1967 conviction for the second degree murder of Mr. Isabel Sanchez. The jury found all special circumstance elements true as alleged and returned a verdict finding the allegation of special circumstance to be true as to both defendants.

"At the penalty phase, . . . the prosecution described the 1967 murder and defendant's confession to that crime. Defendant then sought to present testimony that his confession was involuntary; the court refused to permit such testimony. The prosecution also presented evidence that defendant had been paroled from the 1967 conviction on September 8, 1975, that on May 10, 1977, he had been returned to prison for violation of the parole condition regarding use of alcohol, but was again paroled on September 23, 1977 . . . .

". . . . The jury returned a verdict of death as to defendant and life imprisonment without possibility of parole for Valencia." (Footnote omitted.)

In respondent's automatic appeal to the California Supreme Court, under California Penal Code section 1239(b), said court in an opinion dated February 1, 1980, affirmed the judgment of guilt of first degree murder but reversed the sentence of death with three of the seven

Justices dissenting as to the reversal of penalty. (*People v. Velasquez, supra,* (1980) 26 Cal. 3d 425.) (Appendix A.) On February 27, 1980, the California Supreme Court denied petitioner's petition for rehearing with three Justices voting to grant. (Appendix B.) On March 24, 1980, Justice William H. Rehnquist, Associate Justice of the United Supreme Court and Circuit Justice of the Ninth Circuit, granted a stay of the proceedings herein, " . . . pending the issuance of this Court's opinion in *Adams v. Texas,* No. 79-5175 and the timely filing and disposition of a petition for writ of certiorari." (A-773, *California v. Velasquez, supra,* 48 U.S.L.W. 3626 (March 24, 1980).)

STATEMENT OF FACTS RELATIVE TO EXCUSAL OF PROSPECTIVE JUROR MAUREEN RUNDEE

The sole issue raised in this petition relates to the excusal for cause of prospective juror Maureen Rundee. The California Supreme Court held that the excusal of Mrs. Rundee for cause was in violation of *Witherspoon v. Illinois* (1968) 391 U.S. 510, and thus mandated reversal of the penalty of death. (*People v. Velasquez, supra,* 26 Cal. 3d 425, 436-443.) (Appendix A, pp. 42-52.) Furthermore, the court held that there was no waiver of alleged *Witherspoon* error by the failure to object to the excusal of Mrs. Rundee by the defense. (*People v. Velasquez, supra,* at p. 443.) (Apendix A. pp. 52-53.) Additionally, the court held that the excusal of Mrs. Rundee was not harmless error even though the prosecution had 25 unused peremptory challenges. The prosecutor had stated that if she were not challenged for cause, he would use a peremptory challenge to remove her from the panel. (*People v. Velasquez, supra,* at pp. 437, 438 fn. 9, 444, 445, 447.) (Appendix A, pp. 43-45, 54.)

In the course of voir dire, Mrs. Maureen P. Rundee was examined by both the prosecution and the defense. Mrs. Rundee stated that she was a technical editor and lived in Los Angeles. (RT 1374.) The trial judge asked Mrs. Rundee: "Any member of your immediate family or close circle of friends ever been victimized by any type of criminal activity?" (RT 1374.) Mrs. Rundee replied: "The only thing I can think of, my sister was kidnapped when she was eight. That was about 18 years ago." The court asked about how old Mrs. Rundee was at the time and she stated that she was 12 years old. (RT 1374-1375.) Mrs. Rundee stated that she was 27 years old at the time of the voir dire and as such it took place "13 years ago, I guess." (RT 1375.)

The trial judge asked Mrs. Rundee, "Well, that must have been quite a traumatic event around your household, wasn't it?" She replied, "Yes, it was." The trial judge asked Mrs. Rundee, "Did they apprehend the person that kidnapped your sister?" Mrs. Rundee replied, "No, they didn't." The court asked if her sister was harmed in any way and Mrs. Rundee said that she was not harmed. (RT 1375.) The trial judge asked Mrs. Rundee if her sister knew who it was that kidnapped her and Mrs. Rundee said that she did not. When asked by the trial judge if the person wore a mask, Mrs. Rundee replied, "No. He came in the night. He broke into the house." The trial judge replied, "And took her away some place?" Mrs. Rundee replied, "Yes." Mrs. Rundee noted that her sister was only gone for a matter of about half an hour. The trial judge asked, "But they didn't get any evidence of who the person might have been?" Mrs. Rundee replied, "No, they never caught him." (RT 1375.)

Mrs. Rundee said the incident took place in a little town called Sparta in Wisconsin. (RT 1375-1376.) Mrs. Rundee could not think of any other events of a criminal

nature involving members of her family or "circle of friends." (RT 1376.)

Questions were asked of Mrs. Rundee relative to her knowledge of the attorneys, defendants and the witnesses whom she said she did not know. She was also asked questions about the use of alcoholic beverages and psychiatrists. (RT 1376-1377.) The trial judge asked Mrs. Rundee: "And how about your persuasion, if any, about the death penalty?" Mrs. Rundee replied: "I have a strong persuasion about the death penalty." (RT 1377.) The trial judge asked Mrs. Rundee what her persuasion was relative to the death penalty and she replied, "I'm against it." The trial court asked, "Are you so against it that you would just automatically vote against the death sentence should this case go into the stage of sentence?" Mrs. Rundee replied:

> ". . . . Well, let me put it this way.
>
> "I think there might be a hypothetical case in which a crime that was so heinous was committed that I would consider the death sentence. But I have not been able to think of a hypothetical of that nature."

The trial judge then asked, "So that you would have to agree, at this point, that in your own thinking you would automatically vote for — or vote against the death sentence unless there was something really heinous?" Mrs. Rundee replied, "Most likely, yes." (RT 1377.) The trial judge then stated, "Based on that, ma'am, I have to excuse you for cause." Mrs. Rundee replied, "Okay," and the trial judge stated, "Thank you for your integrity and honesty." (RT 1377.)

At that point, the prosecutor stated, "Your Honor, could we approach the bench?" The trial judge replied, "Yes," and counsel approached the bench. (RT 1378.)

The prosecutor stated, "As I understood her answer, she stated that she would, in the event that the case was so heinous." The trial judge replied, "Right." The prosecutor said:

> ". . . . But she was unable to think of a case that would be so heinous as to warrant the death penalty.
>
> "Alone, I think that that would have been sufficient. But then she did — there was something more there that would indicate that she would actually consider the matter, didn't she?"

The trial judge replied:

> ". . . . No. She's admitted that she would, except in a case that was so heinous, she would vote against the death penalty.
>
> "See, it will have to be so heinous for her to consider it — but, otherwise, she's going to vote against it.
>
> "Why are you objecting, of all people?"

The prosecutor replied:

> ". . . . No, I'm not objecting. I'm concerned with regard to the record.
>
> "I just wondered if that was really sufficient, because she — whether or not she has met the criteria. It seems that — at least, I get the impression that there might be some cases where she could impose the death penalty.
>
> "If that is so, then I would think that she should not, could not be excused."

The trial judge stated:

> ". . . . But she made a declaration that is tantamount to absolutely against it, unless it is so heinous.
>
> "I think now — I think that's ample cause to excuse.
>
> "Maybe the defendants want to say something. She's the type of juror that they are apt to want to keep on.
>
> "I certainly wouldn't think the district attorney — " (RT 1378-1379.)

The prosecutor replied:

> ". . . . Your Honor, I'm not trying to say — if she were not a challenge for cause, I would kick her off on a peremptory challenge. That is not the point at all.
>
> "I was just a little bit concerned as to whether or not there's sufficient cause. But perhaps —"

The trial judge stated:

> ". . . . Well, let's hear from the defense counsel.
>
> "I'll put her back in the box if you want to ask questions of her." (RT 1379.)

Mr. Staven, counsel for respondent Velasquez' codefendant, Valencia, replied:

> ". . . . I don't.
>
> "I'm not agreeing that she be excused. I'm not getting into it, period.
>
> "Maybe Mr. Manaster [counsel for respondent Velasquez] has some other thoughts."

The attorney for respondent Velasquez stated: "The Court has indicated its feelings. So I agree with Mr. Staven's feelings." The trial judge replied, "Well, he

hasn't expressed his feelings." Counsel for codefendant Valencia stated, "That's right." Counsel for respondent Velasquez stated, "I think he's a lot like the jurors up there." The trial judge replied:

> " . . . . I'm going to stand by my ruling.
>
> It's plenty clear to me.
>
> "She's excused." (RT 1379.)

The trial judge then excused Mrs. Rundee for cause. (RT 1380.)

The prosecutor also noted, in the course of the voir dire at the bench:

> " . . . . With regard to the previous juror, Mrs. Rundee, my questions to the Court at that time, it does not indicate — I do not want them to be interpreted as a disagreement with the Court. I only said it out of an abundance of caution. And I'd like the record to reflect that." (RT 1387.)

The defense voiced no objection to the excusal of Mrs. Rundee until the motion for new trial after the judgments of guilt and death had been rendered. (RT 4231-4232, 4239-4241.) The trial judge stated in pertinent part in denying the motion for new trial:

> "First, as to the excusing of Juror Rundee, her excusing was absolutely mandated in this Court's opinion.
>
> "When she said she could not think of a hypothetical case so heinous to consider the death sentence, this was tantamount to saying she would automatically vote against the death sentence. And the reasoning is clear. Heinous is defined as, quote, 'enormously and flagrantly criminal,' and that definition will be found in

> most dictionaries, but is clearly set forth in Webster's Third International Dictionary at Page 1050, which would have to place it far beyond practically all murders. And, certainly, this was a case that could never, under any circumstances, be considered heinous.
>
> "So when she said that, she is saying she could never invoke the death sentence.
>
> "And while the Court didn't dialogue Rundee's knowledge of the Manson killings and other heinous crimes of wide publicity, the Court must assume that Rundee has not lived in a societal vacuum and that she expressed her opinion based on her lifetime of knowledge. This lifetime of knowledge found her not only opposed to the death sentence, but unable to conjure up in her thinking a crime which would permit its application.
>
> "And would not the defendant Velasquez so agree were it as to a prospective juror stating words indicating an automatic vote for the death sentence? Of course not. Her language and her state of mind indicated clearly automation. And the Witherspoon case does not say that it has to be made in that specific language.
>
> "So as I previously stated, the excuse of Rundee was absolutely mandated." (RT 4268-4270.)[1]

---

[1] By reason of California Penal Code sections 1070(a) and 1070.5, the prosecutor had 36 peremptory challenges. However, it appears in the record that the prosecutor only used 11 of those peremptory challenges, leaving him with 25 unused challenges. (RT 1068, 1113, 1161, 1209, 1239, 1272, 1338, 1392-1393, 1416, 1466, 1522.)

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I.

THE EXCUSAL OF PROSPECTIVE JUROR MAUREEN RUNDEE FOR CAUSE WAS PROPER UNDER *WITHERSPOON V. ILLINOIS, SUPRA,* (1968) 391 U.S. 510

In *Witherspoon v. Illinois, supra,* (1968) 391 U.S. 510, 522-523 fn. 21, this Court held that prospective jurors could be excused for cause who made it:

> ". . . . unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt* . . . ."

The decision of the California Supreme Court creates an unrealistic standard under which to apply *Witherspoon* in terms of excusal for cause. Thus, it is urged that Mrs. Maureen Rundee who was excused for cause relative to her position on capital punishment, was properly removed for cause from the jury.

Mrs. Rundee, a prospective juror, when inquired relative to the death penalty, replied: "I have a strong persuasion about the death penalty." She further said, "I'm against it." (RT 1377.) The trial court asked Mrs. Rundee: "Are you so against it that you would just automatically vote against the death sentence should this case go into the stage of sentence?" (RT 1377.) Mrs. Rundee replied:

> ". . . . Well, let me put it this way.

> "I think there might be a hypothetical case in which a crime that was so heinous was committed that I would consider the death sentence. But I have not been able to think of a hypothetical of that nature."

The court then asked her: "So that you would have to agree, at this point, that in your own thinking you would automatically vote for — or vote against the death sentence unless there was something really heinous?" Mrs. Rundee replied, "Most likely, yes." (RT 1377.)

As Justice Richardson stated in his dissent in the California Supreme Court opinion in *People v. Velasquez, supra,* 26 Cal. 3d 425, 445 (Appendix A, p. 56):

> "The majority contends, however, that Mrs. Rundee's response was 'equivocal,' for it demonstrated that she conceivably could impose death in a heinous case. The majority thereby mischaracterizes her answer: She merely admitted the hypothetical possibility that some unimaginable crime might someday, somewhere, occur which would warrant the extreme penalty. Such a response is wholly consistent with an unmistakably clear inability to impose the death penalty . . . . "

The context of Mrs. Rundee's statement shows proper excusal under *Witherspoon.* While she said there might be a hypothetical case in which a crime was so heinous that she would consider the death penalty, she was not able to think of a hypothetical of that nature. The trial judge pointed out, in denying the motion for new trial:

> "And while the Court didn't dialogue Rundee's knowledge of the Manson killings and other heinous crimes of wide publicity, the Court

> must assume that Rundee has not lived in a societal vacuum and that she expressed her opinion based on her lifetime of knowledge. This lifetime of knowledge found her not only opposed to the death sentence, but unable to conjure up in her thinking a crime which would permit it's application." (RT 4268-4269.)

Mrs. Rundee was 27 years old at the time of the voir dire. (RT 1375.) It must be presumed that she had a lifetime of knowledge which would include not only the "Manson killings," as pointed out by the trial court, but also the unspeakable activities of the purveyors of the Third Reich, such as Hitler or Eichmann. As such, it must be presumed that Mrs. Rundee, being of that age and having lived in the century that spawned not only Charles Manson but also other detestable individuals who committed genocide and who have so unfortunately permeated this era, should have her answer read in the context that she would in fact automatically vote against the death penalty, no matter the facts.

Thus, it is urged, that if any individual in this century, because of the horrible crimes against humanity which have been exhibited, states that there might be a hypothetical case that was so heinous that a death sentence could be considered, but that that individual would not be able to think of a hypothetical of that nature, that is tantamount to an automatic refusal ever to give the death penalty in any case.

As such, certiorari should be granted to allow this Court to create realistic standards in application of *Witherspoon.* Thus application of *Witherspoon* would not run the risk of becoming a mere verbal game but instead have meaning in terms of the criteria relative to the proper excusal for cause of prospective jurors. In this regard, it

should be noted that the California Supreme Court reversed the penalty of death on the specific grounds that " " . . . in dismissing juror Maureen Rundee, the trial court acted contrary to the holding of the United States Supreme Court in *Witherspoon." (People v. Velasquez, supra,* at p. 436.) (Appendix A, p. 42.) As such, the ruling of the court was purely on Federal grounds and thus subject to review by this Honorable Court.

II.
FAILURE TO OBJECT WAIVES ALLEGED *WITHERSPOON* ERROR

The opinion of the California Supreme Court holds that failure to object to the excusal of a prospective juror relative to her views of the death penalty is not a waiver of *Witherspoon* error. (*People v. Velasquez, supra,* 26 Cal. 3d 425, 443.) (Appendix A. pp. 52-53.)

When the trial judge was about to excuse Mrs. Rundee for cause, the prosecutor requested that there be further questioning. (RT 1377, 1379.) The trial judge then asked for the defense counsel's comments stating:

> ". . . . Well, let's hear from the defense counsel.
>
> "I'll put her back in the box if you want to ask questions of her."

Mr. Staven, the attorney for codefendant Valencia said:

> ". . . . I don't.
>
> "I'm not agreeing that she be excused. I'm not getting into it, period.
>
> "Maybe Mr. Manaster [respondent Velasquez's counsel at trial] has some other thoughts."

Respondent Velasquez's counsel said: "The Court has indicated its feelings. So I agree with Mr. Staven's [Valencia's counsel] feelings." The trial judge stated, "Well, he hasn't expressed his feelings." Valencia's lawyer stated, "That's right." Respondent Velasquez's attorney stated, "I think he's a lot like the jurors up there." The trial judge stood by his ruling. (RT 1379.)

It was not until a motion for new trial, after the guilt verdict and sentence of death had been rendered, that for the first time the defense objected to the excusal of Mrs.

Rundee on *Witherspoon* grounds. (RT 4240, *et seq.*)

This Court has repeatedly held that a defendant may not raise objections relative to the jury selection process for the first time on a motion for new trial but rather must make objections at the time jury selection takes place. (*Francis v. Southern Pacific Co.* (1948) 333 U.S. 445, 456-457; *Alexander v. United States* (1891) 138 U.S. 353, 355.) Furthermore, the question whether or not a federal right is properly raised and preserved is a federal question. (*Parker v. Illinois* (1948) 333 U.S. 571, 574.)

As such, it is urged that since respondent's trial counsel did not object to Mrs. Rundee's excusal at the time she was removed, the issue is not grounds for setting aside the penalty phase. (Note also *Queenan v. Oklahoma* (1903) 190 U.S. 548, 551.) The California Supreme Court's citation of *Maxwell v. Bishop* (1970) 398 U.S. 262, 263, is not dispositive because voir dire in that case took place in 1962 before *Witherspoon* came down. In addition, *Boulden v. Holman* (1969) 394 U.S. 478, 479, cited by the Court is also not in point as voir dire occurred before the rendition of the *Witherspoon* opinion. (See *Boulden v. State* (1965) 179 S.2d 20, 24, wherein it was noted that the defendant was sentenced on May 29, 1964.) Furthermore, the summary grants of certiorari in *Harris v. Texas* (1971) 403 U.S. 947, and *Wigglesworth v. Ohio* (1971) 403 U.S. 947, remanding the cases in light of *Witherspoon* cited in the California Supreme Court opinion are also of no precedential value concerning the issue of waiver since the voir dire in those cases also occurred before the *Witherspoon* opinion was rendered. (*State v. Wigglesworth* (1969) 248 N.E.2d 607, 609; *Harris v. State* (1970) 457 S.W.2d 903, 908.)

The *Witherspoon* decision came down on June 3, 1968, but the Court at page 523 fn. 22 held *Witherspoon* to be

retroactive. As the above decisions involved voir dire of the jury which occurred before *Witherspoon* came down, no objection would have been necessary because defense counsel in those cases would not have known of the *Witherspoon* decision. As such, those cases would not be precedent for the proposition that *Witherspoon* error is not waived by a failure to object after the *Witherspoon* decision came down.[2]

It is strongly urged that for *Witherspoon* error to be a basis of the nullification of the judgment of death, there must be objections to the excusal of that juror at the time that particular prospective juror is removed. This is especially true in this case in which the record reflects that defense counsel were aware of the *Witherspoon* case and ramifications but refused to object at the time the prospective juror was excused. It can be inferred that the failure to object was for two tactical reasons: Mrs. Rundee as a child had her sister kidnapped and as such her family had been a victim of a crime. (RT 1374-1376.) Therefore the defense, because of her status of being a close family member of a victim of a crime, might have desired her not being on the jury. Secondly, as indicated in the case cited below, the defense might have thought to inject possible error on appeal by not objecting when Mrs. Rundee was excused but waiting until the motion for new trial. (RT 4240, *et seq.*)

In *Queenan v. Oklahoma, supra,* 190 U.S. 548, 551, in the course of trial the Government announced that it had

[2]In the same manner, cases cited by the court of *People v. Risenhoover,* 70 Cal. 2d 39, 56, 73 Cal. Rptr. 533, 544, 447, P.2d 925 (1968); and *In re Anderson,* 69 Cal. 2d 613, 618-619, 73 Cal. Rptr. 21, 25, 447 P.2d 117, 121 (1968), would also not be viable precedent since the voir dire in those cases also occurred before the rendition of *Witherspoon.* (*People v. Velasquez, supra,* at p. 443.) (Appendix A, p. 53.) As such, the issue herein is one totally of Federal interpretation subject to the scrutiny of this Honorable Court.

been informed that one of the jurors had in fact been convicted of a felony, grand larceny, contrary to the statement on voir dire. The court asked counsel for the defendant what they desired to do intimating that if the objection were pressed the juror would be excused. That of course meant that the trial would start over again. Counsel for the defendant answered that they had nothing to say and the trial went on. This Court in *Queenan* held that such a statement was a waiver. As this Court said at page 552 of the *Queenan* decision, defense counsel, ". . . could not speculate on the chances of getting a verdict and then set up that he had not waived his rights." As such, it is urged that the failure of defense counsel to object to the excusal of Mrs. Rundee precludes reversal of the penalty of death on *Witherspoon* grounds.

In addition, other jurisdictions, contrary to *Velasquez,* have held that failure to object on alleged *Witherspoon* grounds acts as a waiver of any such purported error. (*Clark v. State,* 573 S.W.2d 622, 625, 626 (Ark. 1978); *Von Byrd v. State,* 569 S.W.2d 883, 891 (Tex. Crim. App. 1976), *cert. denied,* 441 U.S. 967 (1979); *Shippy v. State,* 556 S.W.2d 246, 251 (Tex. Crim. App. 1977), *cert. denied,* 434 U.S. 935 (1977); *Boulware v. State,* 542 S.W.2d 677, 683 (Tex. Crim. App. 1976), *cert. denied,* 430 U.S. 959 (1977).) As such, the conflict of interpretation of federal law between the various states should be additional grounds for the granting of certiorari in this case.(*Buffalo Forge Co. v. Steelworkers* (1976) 428 U.S. 397, 404; *Davis v. United States* (1973) 411 U.S. 233, 236; *United States v. Dionisio* (1972) 410 U.S. 1, 5.)

III.

ANY ALLEGED *WITHERSPOON* ERROR IS HARMLESS WHERE AFTER THE COMPLETION OF JURY SELECTION, THE PROSECUTION HAS TWENTY-FIVE UNUSED PEREMPTORY CHALLENGES

At the conclusion of vior dire of the jury, the prosecution had 25 unused peremptory challenges. California Penal Code section 1070(a) reads in pertinent part: ". . . . If the offense charged be punishable with death, or with imprisonment in the state prison for life, the defendant is entitled to 26 and the state to 26 peremptory challenges. . . ." Section 1070.5(a) reads in pertinent part:

> ". . . when two or more defendants are jointly tried for any public offense, whether felony or misdemeanor, the state and the defendants shall be entitled to the number of challenges prescribed by Section 1070, which challenges on the part of the defendants must be exercised jointly. Each defendant shall also be entitled to five additional challenges which may be exercised separately; the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants."

Since respondent Velasquez was tried along with Valencia, the prosecution under section 1070(a) was entitled to 26 peremptory challenges plus 10 additional peremptory challenges under 1070.5(a), making a total of 36 authorized peremptory challenges. In the course of the voir dire, the prosecutor used only 11 of these peremptory challenges, leaving 25 unused peremptory challenges. (RT 1068, 1113, 1161, 1209, 1239, 1272, 1338, 1392-

1393, 1416, 1466, 1522; *People v. Velasquez, supra,* 26 Cal.3d 425, 447, Richardson, J., dissenting.) (Appendix A, p. 57.) However, the Court in *Velasquez* at page 444 held that failure of the prosecution to utilize all of its peremptory challenges did not make alleged *Witherspoon* error harmless, noting: " . . . . The Supreme Court's summary reversal in *Davis v. Georgia, supra,* 429 U.S. 122, of a lower court decision finding *Witherspoon* error nonprejudicial, suggests that we interpreted the high court's opinion correctly." (Appendix A, p. 54.) However, such is not the case. The question of unused peremptory challenges is one open for discussion. As can be seen by the dissenting opinion of Justice Rehnquist in *Davis v. Georgia* (1976) 429 U.S. 122, 124:

> "It is, moreover, unclear whether the State was entitled to another peremptory challenge, . . . and surely *Witherspoon* does not decide whether the presence of unexercised peremptory challenges might render harmless the improper exclusion of a limited number of veniremen." (Footnote omitted.)

As Justice Rehnquist pointed out in his dissent, it was unclear in *Davis* whether or not there were excess peremptory challenges available to the prosecution in *Davis*, since in Georgia the prosecution is entitled to use half of the peremptory challenges allowed to the defense and the defense used 21 while the prosecution utilized 10. (*Davis v. Georgia, supra;* Rehnquist, J., dissenting.)

In this case, it is clear that the state was entitled to a possible 25 additional peremptory challenges which were unused. As such, the issue (raised by Justice Rehnquist in his dissent in *Davis*) is clearly before the Court namely, the harmless error effect if *Witherspoon* error is alleged to exist but the prosecution had unused peremp-

tory challenges at the completion of voir dire. The issue is especially acute in this particular case since the prosecutor stated on the record that if Mrs. Rundee were not challenged for cause, he would have removed her on a peremptory challenge. (RT 1379.) As such, the issue is squarely before the court whether or not alleged *Witherspoon* error can be harmless if the prosecution has unused peremptory challenges (especially as plentiful as in this particular case) where the prosecutor states on the record that he would use the peremptory challenge on a prospective juror excused for cause. (Cf., *Conn. Mut. Life Ins. Co. v. Hillmon* (1903) 188 U.S. 208, 212.)

That this issue is one solely of Federal dimension is reflected by the in-chambers opinion of Justice Rehnquist granting a stay of the proceedings herein:

> "I am not persuaded by the response that the decision below rests upon a reading of state law by the Supreme Court of California. Neither *In re Anderson,* 69 Cal.2d 613, 73 Cal. Rptr. 21, 447 P.2d 117 (1968), which was cited by the court below, nor *People v. Wheeler,* 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978), which was not, supports respondent's position. Anderson, as I read it, was based primarily upon this Court's decision in *Witherspoon.* Wheeler, while itself based on state law, seems clearly distinguishable from the present case." (A-773, *California v. Velasquez, supra,* 48 U.S.L.W. 3626 (March 24, 1980).)

As such, it is urged that this issue specifically delineated in the dissent in *Davis v. Georgia* is ripe for the decision in this case and as such, it is urged, that certiorari be granted.

CONCLUSION

For the foregoing reasons, petitioner submits that the writ of certiorari should issue and review the decision of the Supreme Court of the State of California.

Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney General
of the State of California
ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General — Criminal Division
S. CLARK MOORE,
Assistant Attorney General
NORMAN H. SOKOLOW,
Deputy Attorney General
HOWARD J. SCHWAB,
Deputy Attorney General

By HOWARD J. SCHWAB
Deputy Attorney General

Attorneys for Petitioner

APPENDIX

Appendix A

In the Supreme Court State of California

THE PEOPLE,

Plaintiff and Respondent,

v.

NICK RAMON VELASQUEZ,

Defendant and Appellant.

Crim. 20834
Super. Ct. No. A 556 734

This case arises under the 1977 death penalty legislation (Stats. 1977, ch. 316, pp. 1256-1266) since superseded by the 1978 initiative currently codified as Penal Code sections 190 to 190.5. Defendant[1] was charged and convicted of the first degree murder of Mario Casas. The jury found two special circumstances: that the murder of Casas was willful, deliberate, premediated, and personally committed by defendant during the commission of a robbery; and that defendant had been previously convicted of second degree murder. It fixed his punishment at death. Defendant's appeal is automatic.

---

[1] Defendant Velasquez was tried jointly with codefendant Angel Valencia. The jury did not impose a death penalty upon Valencia; consequently this appeal relates only to Velasquez. In this opinion the term "defendant" in the singular refers to Velasquez; "defendants" in the plural to both Velasquez and Valencia.

As we explain, we find no reversible error which affects the verdict of guilt or the finding of special circumstance. Since no juror otherwise qualified was excluded because of his automatic opposition to the death penalty, defendant lacks standing to assert that a death-qualified jury is unrepresentative or biased on the issue of guilt. His contention that substantial evidence does not support the special circumstance finding of *premeditated* murder during the commission of robbery has arguable merit, but the issue is immaterial since undisputed evidence supports the alternative finding that defendant had suffered a prior murder conviction.

The penalty verdict, however, must be reversed. The trial court improperly excluded a prospective juror although the voir dire failed to make it "unmistakably clear" that the juror "would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 522, fn. 21.) (Hereafter cited as *Witherspoon*.) Such error compels reversal of a judgment imposing a death penalty.

1. Statement of the Case.

Defendant Velasquez and codefendant Valencia were charged by information with the murder of Mario Casas. The information alleged, as a special circumstance permitting imposition of the death penalty, that the defendants personally committed a premeditated murder during the commission of a robbery. (See former Pen. Code, § 190.2, subd. (c)(3).) As to defendant Velasquez, the information asserted a second special circumstance: that defendant personally committed the murder and had previously been convicted of second degree murder. (See former Pen. Code, § 190.2, subd. (c)(5).) The information also charged that in the commission of the murder defendants had used a firearm within the meaning of Penal Code section 1203.06, subdivision (a)(1); at trial the prosecution amended the information to charge firearm use also under section 12022.5.

Both defendants pled not guilty. Prior to trial, both presented a series of motions. First, they moved to strike the allegation of special circumstances as an abuse of prosecutorial discretion. The court heard testimony from Deputy District Attorney Trott, who explained the basis on which the district attorney decides whether to charge special circumstances, and denied the motion. Defendants further moved in the alternative either for separate guilt and penalty juries or to limit the voir dire of the jurors concerning their views on capital punishment. After a lengthy hearing at which defendants presented expert testimony on the effect upon the jury of excluding persons opposed to the death policy, the court denied the motion.

At trial the prosecution proved that the victim, Mario Casas, was an attendant at a Texaco gas station at the corner of Garvey and Delta Streets in Los Angeles. He was killed by a single .22 caliber bullet, fired at a distance of a few feet, which penetrated his lung and the pericardial sac. Death occurred shortly after 10 p.m. on November 3, 1977.

Earlier that evening defendant was at his mother's home helping Gilbert Seguin paint the kitchen. Valencia arrived there about 8 p.m. and later talked to defendant for about 20 minutes. About 9:30 defendant and Valencia borrowed Seguin's car to purchase more beer.

About 10 p.m. Maria Somers and her mother, Josefina Somers, purchased cigarettes at the Texaco station where Casas worked. As they drove from the station they observed Casas struggling with two men. One, whom they

identified as Valencia, was holding Casas by the arm and shoulder. The other, whom they could not identify, was holding a gun to the attendant's stomach.

The Somerses drove away from the station, found a police officer, and returned with him to the station. When they arrived, the two men had left. Casas was lying on the ground, shot, holding the torn half of a dollar bill in his hand. Texaco employees later testified that some of the evening's gas receipts were missing.

Benjamin Leyva, who lives near the gas station, testified that he heard sounds of scuffling. He looked and saw one man struggling with the attendant while another stood by some distance away. He then heard a shot, and saw the man who had been struggling with the attendant push the attendant away. The attendant fell to the ground; the other man ran to a car, which drove away with the man who had been struggling with the attendant in the passenger's seat. Leyva examined the attendant, decided he was probably dead, and started toward a liquor store to call the police when the officers accompanied by the Somerses arrived.

A sheriff's deputy testified that between 10 and 11 p.m. he stopped a car matching the description of the vehicle involved in the gas station robbery. Defendant, the driver, and Valencia emerged and were arrested. A search of the vehicle turned up a .22 caliber pistol which ballistic evidence later showed was the murder weapon. Bills were wrapped around the grip of the pistol and fastened with a rubber band. The officers also discovered an envelope containing 16 $1 bills.

Both defendants testified. Valencia said that he had shot the attendant after an argument which began when the attendant called him "stupid" in Spanish. Valencia claimed he had not intended to rob the gas station; the attendant had thrown money in Valencia's face so, after he shot the

attendant, he picked up the money and took it. Valencia denied that defendant had anything to do with the killing or robbery; he excused his own participation by claiming to be high on PCP and alcohol at the time. Defendant's testimony, consistent with that of Valencia, was that defendant was merely standing by when Valencia began an argument with the attendant and shot him.

The evidence thus established without contradiction that defendants were the two persons present at the murder scene. The evidence was in conflict, however, as to who actually shot Casas. The testimony of the Somerses indicated that both defendants participated in the robbery and murder, with Velasquez actually shooting the victim; that of Leyva and the defendants that Valencia shot the attendant with Velasquez an uninvolved bystander.[2]

The jury resolved this conflict against defendant Velasquez. It found both defendants guilty of first degree murder, thus rejecting testimony that Velasquez was a mere spectator of the crime. It further found the use of a firearm allegation true as to Velasquez but untrue as to Valencia, a verdict which clearly implies that Velasquez was the one who shot the attendant.

The special circumstance allegation against defendant Velasquez was based on two grounds. Prerequisite to either ground is a jury finding that "The defendant was personally present during the commission of the act or acts

---

[2]The testimony of Maria and Josefina Somers and that of Leyva, although apparently inconsistent, could be reconciled. On the one hand, the Somerses were not present when the shot was fired, so although they saw Velasquez with the gun it would be possible that Valencia fired the shot. On the other hand, Leyva did not testify that Valencia shot Casas, but that when he heard a shot he looked up and saw Valencia push Casas away, and Casas then fell down. That testimony is consistent with the possibility that Valencia was holding Casas when Velasquez shot the attendant.

causing death, and with intent to cause death physically aided or committed such act or acts causing death." (Former Pen. Code, § 190.2, subd. (c).) The prosecution then alleged, first, that "The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of. . . . Robbery." (Former Pen. Code, § 190.2, subd. (c)(3).) It further alleged that "The defendant. . . . has been convicted in a prior proceeding of the offense of murder of the first or second degree." (Former Pen. Code, § 190.2, subd. (c)(5).) The allegation against Valencia also alleged the special circumstance of premeditated killing in the course of a robbery.

The prosecution relied on the evidence presented at the guilt phase to show a premeditated killing during the commission of a robbery. To prove defendant's prior murder, the state introduced evidence of his 1967 conviction for the second degree murder of Mr. Isabel Sanchez. The jury found all special circumstance elements true as alleged and returned a verdict finding the allegation of special circumstance to be true as to both defendants.

At the penalty phase,[3] the prosecution described the 1967 murder and defendant's confession to that crime. Defendant then sought to present testimony that his confession was involuntary; the court refused to permit such testimony. The prosecution also presented evidence that defendant had been paroled from the 1967 conviction on September 8, 1975, that on May 10, 1977, he had been returned to prison for violation of the parole condition regarding use of alcohol, but was again paroled on September 23, 1977. The defense unsuccessfully objected to testimony of the parole violation on the ground that it had not received timely notice of such aggravating testimony as required by former Penal Code section 190.3. Defendant further presented favorable character testimony by his sister, his daughter, and his employer.

[3]Before the penalty phase commenced defendants renewed their motion for a separate guilt and penalty jury. The court denied the motion.

Defendant offered to present testimony from Clinton Duffy, former warden at San Quentin State Prison, to explain how the gas chamber worked. He also sought to present testimony from Deputy District Attorney Trott concerning the exercise of prosecutorial discretion in seeking the death penalty. The court rejected both offers. The jury returned a verdict of death as to defendant and life imprisonment without possibility of parole for Valencia.

2. Issues Relating to the Guilt Trial.

Defendant makes no claim that the evidence is insufficient to sustain his conviction for first degree murder. The only contention he presents relating to the guilt phase of the trial concerns the selection of jurors. Defendant points out that *Witherspoon* permits the exclusion of that class of prospective jurors who, although able to render a fair and impartial verdict at the guilt phase, make it "unmistakably clear. . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial." (391 U.S. at p. 522, fn. 21.) Defendant argues that this rule results in a jury at the guilt phase of the trial which is unrepresentative and biased in favor of conviction.

Our review of the record, however, reveals that none of the prospective jurors at defendant's trial fall within the class of those persons who, although otherwise qualified for service, could properly be excluded under *Witherspoon*. Only two prospective jurors were excluded because of their views on capital punishment. One, Mr.

Edwards indicated that he could not be fair and impartial at the guilt phase of trial, and was properly excluded for cause on that ground. Although the trial judge did dismiss Ms. Rundee because he concluded that she had made clear her automatic opposition to the death penalty, the trial court, as we explain in part 4 of this opinion, erred in that conclusion; Ms. Rundee's answers upon voir dire examination suggested that she would consider the death penalty under some circumstances.[4] Thus, the rule which defendant challenges — as distinguished from the mistaken application of that rule by the trial court — did not affect the composition of the jury which tried him.

Accordingly, we conclude that defendant lacks standing to assert that the jury which tried him was unrepresentative or biased on the issue of guilt. The important issue he raises concerning the fairness of a death-qualified jury can be properly reached on direct appeal only in a case in which the *Witherspoon* test itself has actually excluded for cause a juror able to render a fair and impartial verdict at the guilt phase.[5]

3. Issues Relating to the Findings of Special Circumstance.

Defendant contends that substantial evidence does not support the findings of special circumstance.

---

[4]Defendant does not contend that the exclusion of Ms. Rundee as a result of *Witherspoon* error from the jury which determined guilt would constitute error requiring us to reverse the verdict at the guilt phase.

---

[5]We therefore deny defendant's request that we take judicial notice of the record compiled on *People v. Moore* (Alameda County Super. Ct. No. 67113B) relating to the claim of defendants in that case that a death-qualified jury is unfair or unrepresentative.

Both alleged circumstances require a finding that "The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death." (Former Pen. Code, § 190.2, subd. (c).) Defendant contends that no substantial evidence upholds the jury's findings that he acted with the intent to cause the death of Casas.

In *Estate of Kramme* (1978) 20 Cal.3d 567, we said in defining the term "intentionally caused the death of a decedent" in Probate Code section 258 that "For a result to be caused 'intentionally,' the actor must either desire the result or know, to a substantial certainty, that the result will occur." (20 Cal.3d at pp. 572-573.) The record before us here shows that the man who shot Casas, found by the jury to be defendant Velasquez, fired a shot at close range into the victim's chest below the left armpit in a line which caused it to penetrate both lungs and the pericardial sac. The jury could reasonably infer from such evidence that defendant fired the shot with intent to kill, or with knowledge to a substantial certainty that death would result.

The first alleged circumstance additionally requires a finding that the "murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of. . . Robbery."[6] Substantial evidence clearly supports the finding that the killing of

---

[6]Defendant claims the special circumstance allegation relating to a killing during the commission of robbery failed to comply with former Penal Code section 190.4. That section provided that "Wherever a special circumstance requires proof of the commission . . . of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime." Defendant was charged with a murder during the course of a robbery, but he was not charged with the crime of robbery. The literal language of former

Casas was willful and committed during the commission of a robbery, but defendant maintains that no substantial evidence supports the finding of a deliberate and premeditated killing.

The issue of premeditation and deliberation is a close one. Numerous decisions have discussed and defined the concept of premeditation as it serves to distinguish first and second degree murder. A killing is deliberate, they explain, if the killer acted "as a result of careful thought and weighing of considerations, as a *deliberate* judgment or plan; carried on cooly and steadily, [especially] according to a preconceived design." (*People v. Bender* (1945) 27 Cal.2d 164, 183; *People v. Caldwell* (1955) 43 Cal.2d 864, 869; *People v. Anderson* (1968) 70 Cal.2d 15, 26.) "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes . . . those homicides . . . which are the result of mere unconsidered or rash impulse hastily executed." (*People v. Thomas* (1945) 25 Cal.2d 880, 900-901; see *People v. Parrott* (1959) 174 Cal. App.2d 301, 304-305.)

Defendant correctly points out that proof of a sudden killing in the course of an argument and struggle between defendants and the attendant would not prove a deliberate and premeditated murder. The testimony of Maria and Josefina Somers, however, suggests that Valencia restrained Casas while Velasquez held him at gun point for a

---

(footnote continued from preceding page)

section 190.4 supports defendant's contention. The failure to charge robbery as a separate crime, however, was clearly not prejudicial since the information notified defendant that he must defend against the special circumstance of a premeditated killing committed during the commission of a robbery.

brief period before shooting him. Arguably the jury could infer deliberation and premeditation on the basis of that evidence.

In arguing this issue, however, the presecutor went far beyond the question of the inferences which reasonably could be drawn from the manner of the killing and the testimony of the Somerses. He noted that defendants talked together at length before the robbery, and carried out the robbery without masks, disguise, or any attempt to conceal the license number of the car. From those facts the prosecutor argued that defendants must have arrived at a preconceived plan to kill witnesses. We agree with defendant that such argument constitutes "[m]ere conjecture, surmise or suspicion [,] is not the equivalent of reasonable inference and does not constitute proof." (*People v. Bender, supra,* 27 Cal.2d 164, 186.)

Thus, the only evidence of deliberation and premeditation which is "of ponderable legal significance . . . reasonable in nature, credible, and of solid value" (*Estate of Teed* (1952) 112 Cal. App.2d 638, 644; *People v. Bassett* (1968) 69 Cal.2d 122, 139) is the testimony of the Somerses and the nature of the killing itself. The trial court expressed doubt whether the evidence was sufficient to sustain the verdict on that point.[7]

We find it unnecessary to resolve that issue, however, because the finding of premeditation is unnecessary to sustain the special circumstance verdict.[8] That verdict as

---

[7]The judge stated: "It's a very close question. And I'm sure I know many judges on the Appellate Court that might very, very well rule that [the prosecutor] has presented insufficient evidence in this case. [¶] On the other hand, one of our districts, I think would find that the evidence was sufficient. So that is the problem."

---

[8]Defendant's reply brief contends that the finding of a special circumstance of premeditated murder in the course of robbery, if

to defendant rests on two alternative grounds: either an intentional and premeditated killing in the commission of a robbery, or an intentional killing by one who has previously been convicted of murder. Substantial evidence supports the finding that defendant intentionally killed Casas, and uncontested evidence proves that he had been previously convicted of second degree murder. Accordingly, the verdict of the jury finding a special circumstance which permits the jury to impose the death penalty is itself supported by substantial evidence.

4. Issues Relating to the Penalty Verdict.

As we shall explain, in dismissing juror Maureen Rundee, the trial court acted contrary to the holding of the United States Supreme Court in *Witherspoon*. That error compels reversal of the penalty verdict.

Witherspoon held that a juror could not be excluded for cause in a capital case because of an abstract or generalized opposition to capital punishment; exclusion is proper only if the juror makes it "unmistakably clear . . . that [he] would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case." (391 U.S. at p. 322, fn. 21.) California decisions since *Witherspoon* state the same standard. (See, *e.g., People v. Williams* (1969) 71 Cal.2d 614, 628; *People v. Vaughn* (1969) 71 Cal.2d 406, 416; *People v. Risenhoover* (1968) 70 Cal.2d 39, 56.)

(footnote continued from preceding page)

unsupported by the evidence, is prejudicial error at the *penalty* phase. He notes that the jury before fixing the penalty was instructed in accord with former Penal Code section 190.3, which states that "In determining the penalty the trier of fact shall take into account the existence of any special circumstance found to be true." Since we find that other grounds compel reversal of the penalty verdict, we do not reach the issue posed by defendant.

In light of the *Witherspoon* standard, we examine the following voir dire of Ms. Rundee:

"THE COURT: And how about your persuasion, if any, about the death penalty?

"MRS. RUNDEE: I have a strong persuasion about the death penalty.

"THE COURT: No strong —

"MRS. RUNDEE: I do have.

"THE COURT: Oh, what is that?

"MRS. RUNDEE: I'm against it.

"THE COURT: Are you so against it that you would just automatically vote against the death sentence should this case go into the stage of sentence?

"MRS. RUNDEE: Well, let me put it this way.

"I think there might be a hypothetical case in which a crime that was so heinous was committed that I would consider the death sentence. But I have not been able to think of a hypothetical of that nature.

"THE COURT: So that you would have to agree, at this point, that in your own thinking you would automatically vote for — or vote against the death sentence unless there was something really heinous?

"MRS. RUNDEE: Most likely, yes.

"THE COURT: Based on that, ma'am, I have to excuse you for cause."[9]

[9]The prosecutor had misgivings about the excusing of Ms. Rundee, and approached the bench. The following conversation ensued:

"MR. BOWES [Prosecutor]: As I understood her

(footnote continued from preceding page)

answer, she stated that she would, in the event that the case was so heinous.

"THE COURT: Right.

"MR. BOWES: But she was unable to think of a case that would be so heinous as to warrant the death penalty.

"Alone, I think that that would have been sufficient. But then she did — there was something more there that would indicate that she would actually consider the matter, didn't she?

"THE COURT: No. She's admitted that she would, except in a case that was so heinous, she would vote against the death penalty.

"See, it will have to be so heinous for her to consider it — but, otherwise, she's going to vote against it.

"Why are you objecting, of all people?

"MR. BOWES: No, I'm not objecting. I'm concerned with regard to the record.

"I just wondered if that was really sufficient, because she — whether or not she has met the criteria. It seems that — at least, I get the impression that there might be some cases where she could impose the death penalty.

"If that is so, then I would think that she should not, could not be excused.

"THE COURT: But she made a declaration that is tantamount to [being] absolutely against it, unless it is so heinous.

"I think now — I think that's ample cause to excuse.

"Maybe the defendants want to say something. She's the type of juror that they are apt to want to keep on.

"I certainly wouldn't think the district attorney —

"MR. BOWES: Your Honor, I'm not trying to say — if she were not a challenge for cause, I would kick her off on a peremptory challenge. That is not the point at all.

"I was just a little bit concerned as to whether or not there's sufficient cause. But perhaps —

Ms. Rundee initially stated that she had "a strong persuasion about the death penalty," namely, that she was "against it." Such generalized statements of opposition to capital punishment do not disqualify a prospective juror. *Witherspoon* held expressly that "a sentence of death cannot be carried out if the jury . . . was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty." (391 U.S. at p. 522.) When in *In re Seiterle* (1969) 71 Cal. 2d 698, a juror was excluded who stated "I don't agree with the death penalty," we held that "such general objections to capital punishment cannot properly serve as the basis for a challenge for cause under *Witherspoon.*" (71 Cal. 2d 698, 701.)

(footnote continued from preceding page)

"THE COURT: Well, let's hear from the defense counsel.

"I'll put her back in the box if you want to ask questions of her.

"MR. STAVEN [Attorney for Valencia]: I don't.

"I'm not agreeing that she be excused. I'm not getting into it, period.

"Maybe Mr. Manaster has some other thoughts.

"MR. MANASTER [Attorney for defendant]: The Court has indicated its feelings. So I agree with Mr. Staven's feelings.

"THE COURT: Well, he hasn't expressed his feelings.

"MR. STAVEN: That's right.

"MR. MANASTER: I think he's a lot like the jurors up there.

"THE COURT: I'm going to stand by my ruling. It's plenty clear to me.

"She's excused."

In the instant case the trial judge put his question based upon the *Witherspoon* test to Ms. Rundee but she did not reply affirmatively. Instead she stated that she *would* consider the death sentence in a "heinous" case.[10] That answer is plainly not the equivalent of an automatic rejection of the death penalty regardless of the evidence; to the contrary, Ms. Rundee would necessarily *be compelled to consider the evidence* to determine whether the case before her *was* of a heinous nature.

The 1977 California death penalty legislation contemplates that jurors will consider imposition of the death penalty only in a heinous case. It does not impose capital punishment for all homicides, all murders, or even all first degree murders. The death penalty is possible only if the jury finds one or more "special circumstances." These circumstances include murder by hire, murder by explosive, deliberate murder of a police officer or a witness, deliberate and premeditated murder during the commission of a dangerous felony, murder by torture, and multiple slayings. (See former Pen. Code, § 190.2.) In brief, the statute does not permit consideration of a death sentence in an ordinary homicide, but only when the killing is accompanied by some other circumstance which renders it particularly flagrant or atrocious. Furthermore, even a finding of special circumstance does not compel capital punishment; the jury must still consider evidence in aggravation or mitigation of the crime. (Former Pen. Code, § 190.3.) Thus Ms. Rundee's statement that she would consider the death penalty only in a heinous case, far from describing an extreme and automatic opposition

---

[10]The term "heinous" means "hatefully bad, flagrant, odious, atrocious" (Webster's New Internat. Dict. (2d Ed. 1957) p. 1157); "enormously and flagrantly criminal; (Webster's Third New Internat. Dict. (1961) p. 1050).

to the death penalty, actually described the duty she would assume as a juror in a capital case.[11]

---

[11]In denying defendant's motion for a new trial the trial court explained its reason for dismissing Ms. Rundee. The judge stated:

> "When she [Ms. Rundee] said she could not think of a hypothetical case so heinous to consider the death sentence, this was tantamount to saying she would automatically vote against the death sentence. And the reasoning is clear. Heinous is defined as, quote, 'enormously and flagrantly criminal,' and that definition will be found in most dictionaries, but is clearly set forth in Webster's Third International Dictionary at Page 1050, which would have to place it far beyond practically all murders. And, certainly, this was a case that could never, under any circumstances, be considered heinous.
>
> "So when she said that, she is saying she could never invoke the death sentence.
>
> "And while the Court didn't dialogue Rundee's knowledge of the Manson killings and other heinous crimes of wide publicity, the Court must assume that Rundee has not lived in a societal vacuum and that she expressed her opinion based on her lifetime of knowledge. This lifetime of knowledge found her not only opposed to the death sentence, but unable to conjure up in her thinking a crime which would permit it's application.
>
> "And would not the defendant Velasquez so agree were it as to a prospective juror stating words indicating an automatic vote for the death sentence? Of course not. Her language and her state of mind indicated clearly automation. And the Witherspoon case does not say that it has to be made in that specific language."

We cannot concur in the trial court's reasoning. We cannot assume that Ms. Rundee, when questioned by the trial judge called to mind the Manson murders and other notorious murders which occurred in her lifetime, resolved in her own mind that such killings were not heinous enough to call for a death penalty, and because of that mental classification was unable to think of any case sufficiently heinous. It seems more likely that on the spur of the moment and under the tension of voir dire examination no particularly heinous case sprang to her mind. In any event, *Witherspoon* permits disqualification only

Finally, Ms. Rundee's reply that "most likely" she would automatically vote against the death sentence "unless there was something really heinous" does not disqualify her. In the first place, an "automatic vote" except in a heinous case is not an automatic vote "without regard to any evidence that might be developed at the trial" as required by *Witherspoon.* (See 391 U.S. at p. 322, fn. 21.) In the second place, the response "most likely, yes" is not the unequivocal affirmation required by the California cases interpreting the *Witherspoon* decision. In *People v. Osuna* (1969) 70 Cal. 2d 759, 769, for example, a juror stated "I guess I feel strongly that I could not [impose a death penalty]"; we held her exclusion violated *Witherspoon.* Similarly in *People v. Chacon* (1968) 69 Cal. 2d 765, 773, a juror, asked if he could impose a death penalty, answered "I don't think so"; again we held the exclusion violated *Witherspoon.* (See also *People v. Vaughn, supra,* 71 Cal. 2d 406, 414-416

(footnote continued from preceding page)

if the prospective juror makes it "unmistakably clear" (391 U.S. at p. 522, fn. 21) that he would automatically vote against the death penalty; it does not permit disqualification if that automatic vote is derived by a speculative deduction into the vernireperson's mental process.

People v. O'Brien (1969) 71 Cal.2d 394, illustrates the impropriety of excluding jurors because of their views on hypothetical cases. When juror Voznak indicated his bias in favor of defendant on capital punishment, defense counsel put an elaborate hypothetical case involving the murder for hire of the President and his family. When Vosnak indicated he would still be biased against capital punishment under such circumstances, he was dismissed for cause. Finding the dismissal erroneous, we stated that speculation based on hypothetical cases violated *Witherspoon's* mandate that jurors "cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment." (71 Cal.2d at p. 405, quoting *Witherspoon*, 391 U.S. at p. 522, fn. 21.)

(exclusion of juror Krokoski); *People v. Risenhoover, supra,* 70 Cal. 2d 39, 56.)

The closest parallel to the present case is the exclusion of juror McClarin discussed in *People v. Vaughn, supra,* 71 Cal. 2d 406, 412-413. Ms. McClarin stated that "I really feel that I object so strongly that I couldn't consider the death penalty." The court then inquired, "Mrs. McClarin, would it be fair to say that under no circumstances would you impose the death penalty in any kind of a situation that could be brought before you?" She replied, "Not being able to think of enough cases, I can't say for sure, but I certainly can't think of any myself right now in which I could possibly impose a death penalty." We held that exclusion of Ms. McClarin was error.

Ms. McClarin's initial statement of inability to impose the death penalty is less equivocal than any declaration of Ms. Rundee in the present case. Ms. McClarin's subsequent suggestion that she might be able to vote for the death penalty but could not think of a hypothetical case is almost exactly parallel to Ms. Rundee's "heinous case" example. Thus our conclusion in *Vaughn* that the exclusion of McClarin was *Witherspoon* error compels a conclusion here that the exclusion of Ms. Rundee was error.

The dissent argues that we should uphold that exclusion of Ms. Rundee by analogy to the exclusion of juror Rogers in *People v. Floyd* (1970) 1 Cal. 3d 694. In *Floyd,* the court inquired of the panel whether "there is any juror that entertains such a conscientious opinion that he would under no circumstances vote for the death penalty" (1 Cal. 3d at pp. 724-725); Ms. Rogers replied "I wouldn't vote for the death penalty." (P. 725.) Defense counsel asked: "No matter how heinous the crime?" She replied, "Yes, sir." (P. 728.) Counsel then put to her a ridiculous

hypothetical case of a defendant who confessed to killing ten women and children in a heinous manner, stated he would kill again, and offered the location of the bodies of additional victims for $100 each. In such a case, he asked, could she impose the death penalty. She replied, "I really don't know . . . . It depends on the degree . . . . I would have to get all the facts." (P. 729.) Finally, after counsel had finished questioning the panel, the court inquired of each juror whether in a proper case that juror would "have the courage to vote for a verdict of death?" Ms. Rogers answered, "no." The court asked again: "Even if you thought it was a proper case, you would not have the courage to vote for a verdict of death." She replied, "No, I wouldn't." The court then excused her from the jury. (P. 731.)

The majority in *Floyd* upheld the exclusion of juror Rogers on two grounds, neither of which is applicable to the present case. First, *Floyd* relied on the rule that "Where a prospective juror gives conflicting answers to questions relevant to his impartiality, the trial court's determination as to his state of mind is binding upon an appellate court." (P. 725, quoting *People v. Linden* (1959) 52 Cal. 1, 22.) That rule may have been applicable in *Floyd* because Ms. Rogers gave conflicting answers on voir dire.[12] She first stated that she would not consider the death penalty no matter how heinous the crime but later, when given an example of a heinous crime, she said it

[12]In his dissenting opinion in *Floyd*, Justice Peters questioned whether "the rule quoted from *Linden*, if applied in the scrupled-juror situation, could ever 'comport fully' with the *Witherspoon* holding that it must be 'unmistakably clear' the excluded juror would automatically vote against imposition of the death penalty. If the juror gave 'conflicting answers' to the question as to whether he could ever impose the death penalty and the conflict is not subsequently resolved on voir dire, it simply cannot be said that his automatic opposition to the death penalty is 'unmistakably clear.' " (1 Cal.3d at p. 741.)

would be a question of degree. After initially averring unequivocally that she would not vote for the death penalty in any case, she then stated that in a proper case it would depend on the facts, but still later concluded that even in a proper case she would lack the courage to impose the death penalty.

In contrast, the position of Ms. Rundee in the case at hand was unmarked by conflicting statements. In contrast to Ms. Rogers in *Floyd,* Ms. Rundee never stated that she would "under no circumstances" impose the death penalty, that she would not consider it even for a "heinous crime" or that even in a proper case she could not vote to impose the death penalty. Ms. Rundee's position was consistent throughout the brief voir dire that, although opposed to the death penalty, she would consider it in a heinous case. A rule for trial court resolution of conflicting answers thus has no application to the voir dire of Ms. Rundee in the instant case.

As an alternative ground for upholding the exclusion of Ms. Rogers, the *Floyd* court stated that "we have concluded Miss Rogers made it unmistakably clear that under no circumstances would she impose the death penalty." (1 Cal. 3d at p. 725.) Since juror Rogers had previously stated that she did "not know" whether she would vote for it in a proper case and would "have to get all the facts," the court's conclusion must rest upon her later and unequivocal affirmation that even in a proper case she would not vote for the death penalty.[13] That basis for the

[13]We note that during voir dire the prosecutor asked Ms. Rogers "would you be willing to vote for a verdict of death under any particular circumstances?" She replied, "I can't think of any circumstances now." The prosecutor then moved to disqualify her, but defense counsel objected, observing that "The lady said she could not think of any circumstances. She is not saying there are no circumstances." The trial court denied the prosecutor's motion. It granted a

decision further serves to distinguish the present case in which juror Rundee went no further than to affirm that she would "most likely" vote against death unless the case was "really heinous"; an affirmation which does not demonstrate automatic opposition to a verdict imposing death.

The Attorney General argues that defendant waived the *Witherspoon* error by failing to object to the excusal of Ms. Rundee. The decisions of the United States Supreme Court and of the California courts have unanimously ruled that *Witherspoon* error is not waived by mere failure to object. Shortly after *Witherspoon,* the United States Supreme Court reversed and remanded two cases in which the *Witherspoon* error was raised neither at trial nor on appeal. (*Maxwell v. Bishop* (1970) 398 U.S. 262; *Boulden v. Holman* (1969) 394 U.S. 478.) The court then granted certiorari in *State v. Wigglesworth* (Ohio 1969) 248 N.E.2d 607, in which the Ohio Supreme Court had held the defendant waived *Witherspoon* error (see 248 N.E.2d at pp. 613-614), and reversed *per curiam,* citing *Witherspoon, Maxwell v. Bishop, supra,* and *Boulden v. Holmen, supra.* (*Wigglesworth v. Ohio* (1971) 403 U.S. 947.) *Harris v. Texas* (1971) 403 U.S. 947, also summarily reversed a lower court decision holding that failure to object waived *Witherspoon* error.

(footnote continued from preceding page)

subsequent motion to disqualify her only after she had replied with an unequivocal "no" to the question whether in a proper case she would "have the courage to vote for verdict of death." (See 1 Cal.3d at pp. 729-731.)

Thus the trial court in *Floyd* concluded that a juror's inability to think of a hypothetical case in which she would favor a death verdict is not sufficient to disqualify the juror under *Witherspoon*; only a clear and definite statement that in no case would she vote for death sufficed to excuse her for cause.

The California decisions similarly reject waiver of *Witherspoon* error. (See *People v. Risenhoover, supra,* 70 Cal. 2d 39, 56; *In re Anderson* (1969) 69 Cal. 2d 613, 618-619.) *People v. Coogler* (1969) 71 Cal. 2d 153, the case on which the Attorney General relies, is distinguishable; defense counsel in *Coogler* did not merely fail to object, but affirmatively stipulated to the removal of the juror in question.

Moreover, in the present case the trial judge was alerted to the possibility of *Witherspoon* error by the prosecutor and further was informed that defendants did not consent to the dismissal of Ms. Rundee. (See fn. 9, *ante.*) Thus the function of an objection — to alert the court to the risk of error and permit it to avoid that error — was essentially fulfilled. Furthermore, the court's statement that "I'm going to stand by my ruling. It's plenty clear to me." suggests that any formal objection would have been futile.[14]

Witherspoon error requires reversal of a death sentence without proof of prejudice. (*Davis v. Georgia* (1976) 429 U.S. 122; *In re Seiterle, supra,* 71 Cal. 2d 698, 702; *In re Arguello, supra,* 69 Cal. 2d 613, 618-620.) The same rule arises by implication from the many decisions, including *Witherspoon* itself, which reverse a death penalty for erroneous exclusion of a juror without discussion of prejudice. (See, *e.g., People v. Vaughn, supra,* 71 Cal. 2d 406; *People v. Osuna, supra,* 70 Cal. 2d 759.)

---

[14] We agree with the Attorney General that defense counsel should not "play games" with the trial court, withholding an objection in the hope that the court will overlook reversible error. We cannot agree, however, that counsel in this case had any duty to question Ms. Rundee to clarify asserted ambiguities in her reponses on voir dire. If defense counsel were willing to accept Ms. Rundee as a juror despite the claimed ambiguities, they have no duty to question her to help the prosecution develop a basis for a challenge for cause.

The Attorney General argues that a different rule should apply when the presecution fails to exhaust its preemptory challenges, and thus could have utilized a preemptory challenge to excuse the juror in question. We rejected an identical argument in *In re Anderson, supra,* 69 Cal. 2d 613, 619. "*Witherspoon,*" we said, "did not discuss the effect of the existence of remaining peremptory challenges of the prosecution, but the broad language of the opinion establishes without doubt that in no case can a defendant be put to death where a venireman was excused for cause solely on the ground he was conscientiously opposed to the death penalty. According to our understanding of *Witherspoon*, reversal is automatically required if a venireman was improperly excused for cause on the basis of his opposition to the death penalty." The Supreme Court's summary reversal in *Davis v. Georgia, supra,* 429 U.S. 122, of a lower court decision finding *Witherspoon* error nonprejudicial, suggests that we interpreted the high court's opinion correctly.

The erroneous exclusion of Ms. Rundee requires us to reverse the penalty verdict. We therefore need not and do not resolve the other contentions raised by the defendant relating to the penalty trial.

The judgment is reversed insofar as it relates to penalty. In all other respects the judgment is affirmed.

TOBRINER, J.

WE CONCUR:

BIRD, C.J.
MOSK, J.

People v. Velasquez
Crim. 20834

CONCURRING AND DISSENTING OPINION BY RICHARDSON J.

I concur in the majority opinion to the extent that it affirms the judgment of conviction of first degree murder with special circumstances. I respectfully dissent, however, from that portion of the opinion which reverses the sentence of death on the sole ground that one prospective juror, Maureen Rundee, was erroneously excused for cause. In my view, Mrs. Rundee was properly excluded from the jury panel on the basis of her statement on voir dire that *she could not conceive of a crime so heinous as to justify the death penalty.* As a unanimous verdict was required before a verdict of death could be imposed (former Pen. Code, § 190.4, subd. (b)), the People had a clear right to exclude Mrs. Rundee for cause.

Under well established principles, a prospective juror may be excluded from the panel if he makes it "unmistakably clear . . . that [he] would *automatically* vote against the imposition of capital punishment without regard to the evidence that might be developed at the trial of the case . . . ." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 522, fn. 21, italics in original.) In the present case, Mrs. Rundee stated on voir dire that "I think there might be a hypothetical case in which a crime that was so heinous was committed that I would consider the death sentence. *But I have not been able to think of a hypothetical of that nature.*" (Italics added.) Thus, Mrs. Rundee could not imagine a crime so atrocious as to deserve the penalty of death. Such a response, I suggest, clearly disqualified her as a juror in a capital case under the foregoing *Witherspoon* test.

The majority contends, however, that Mrs. Rundee's response was "equivocal," for it demonstrated that she conceivably could impose death in a heinous case. The majority thereby mischaracterizes her answer: She merely admitted the hypothetical possibility that some *unimaginable* crime might someday, somewhere, occur which would warrant the extreme penalty. Such a response is wholly consistent with an unmistakably clear inability to impose the death penalty. Indeed, we have so held in a case decided more recently than any of the earlier cases cited by the majority.

In *People v. Floyd* (1970) 1 Cal.3d 694, 724-725, several prospective jurors, including Ms. Rogers, had stated on voir dire that they could not vote for a verdict of death. Defense counsel then framed an extremely heinous hypothetical example in the hope of demonstrating some equivocation on the part of these prospective jurors which might qualify them to sit despite their strong feelings against the death penalty. The hypothetical situation involved a defendant who had killed 10 women and children, had threatened to kill again on release from prison, and had offered to disclose the location of his victims' bodies for $100 each. Prospective juror Rogers, when asked if she could vote to impose death in such a case, replied that she did not " 'know about that type of person,' " that the death penalty was a question of " 'degree' " in such a case, that she would need to " 'get all the facts,' " and that " '*I don't know* if I would [impose death] or not. *I really can't say.*' " (Italics added, *id.*, at p. 725.)

We held in *Floyd* that Ms. Rogers was properly excused for cause, as the totality of her responses made it unmistakably clear that under no circumstances could she impose the death penalty. Ms. Rogers' replies were

certainly as "equivocal," as Mrs. Rundee's statements in the present case. Both prospective jurors expressed some reservations about the death penalty as applied to hypothetical examples involving extremely atrocious crimes. Indeed, the present case presents an even stronger example of a proper *Witherspoon* exclusion: In *Floyd*, Ms. Rogers acknowledged considerable difficulty with the hypothetical example posed by defense counsel. In the present case, Mrs. Rundee could not even imagine such a hypothetical!

Floyd reiterated a further rule which has specific application here. " 'Where a prospective juror gives conflicting answers to questions relevant to his impartiality, the trial court's determination as to his state of mind is binding on an appellate court.' [Citations.]" (*Ibid.*) In the present case, the trial court carefully reviewed Mrs. Rundee's remarks and concluded that "When she said she could not think of a hypothetical case so heinous to consider the death sentence, this was tantamount to saying she would automatically vote against the death sentence . . . . And, certainly, this was a case that could never, under any circumstances, be considered heinous." Under *Floyd*, the foregoing characterization of Mrs. Rundee's state of mind is binding on us. The trial court, hearing the words, measuring the intonation of voice, and observing the facial expression, was in the better position to evaluate the depth of a prospective juror's beliefs regarding the death penalty.

Finally, I note that the prosecutor in this case had used only 11 of his 36 peremptory challenges. He affirmatively stated during voir dire examination that, but for the trial court's excuse of Mrs. Rundee for cause, he would have exercised one of his remaining peremptory challenges to excuse her. A reversal of the penalty under such circumstances unduly penalizes the prosecutor for failing to make

what in effect would be a "protective" peremptory challenge and convincingly demonstrates the wholly technical nature of the majority's holding in this case.

People v. Vaughn (1969) 71 Cal.2d 406, 412-413, relied upon by the majority herein, is inapposite. That case, decided *prior to Floyd* (and cited in the *Floyd* dissent) involved a prospective juror whose responses were ambiguous regarding her ability to impose death. For example, the potential juror stated at one point that she would have a "difficult" time deciding the penalty issue, that she was "not sure" if she could impose death, and that she was "afraid" that her feelings on the matter would prevent her from imposing the extreme penalty. Prospective juror Rundee expressed no such equivocation in the present case.

I would affirm the judgment.

RICHARDSON, J.

WE CONCUR:

CLARK, J.
MANUEL, J.

People v. Velasquez
Crim. 20834

CONCURRING AND DISSENTING OPINION BY NEWMAN, J.

I concur with the majority except that I believe we should decide the sufficiency of the evidence to support the jury's finding of the truth of the first alleged special circumstance, that "[t]he murder was willful, deliberate, and premeditated and was committed during the commission . . . of . . . [r]obbery . . ." (former Pen. Code, § 190.2(c)(3).) That finding will directly affect any retrial ensuing our reversal of the judgment insofar as it relates to penalty.

Former Penal Code section 190.3 provides: "In determining the penalty the trier of fact shall take into account any of the following factors if relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted . . . and the existence of any special circumstances found to be true . . . ." Accordingly, on remand the finding that the murder was willful, deliberate, and premeditated and committed during commission of a robbery is likely to be submitted to the jury as a special circumstance to be considered in determining the penalty. If we were to strike the finding the jury would be advised as to the robbery itself as among "the circumstances of the crime" but would not be advised that the murder had been found to be willful, deliberate, and premeditated.

The majority says that we need not consider error in instructing the jury about the finding of the penalty phase of the prior trial, "[s]ince we find that other grounds compel reversal of the penalty verdict." (*Ante,* p. , fn. 8 [typed opn. pp. 14-15].) However, should we not direct the trial court to refrain from repeating its instruction at the penalty retrial if the finding did lack sufficient evidentiary support?

My view is that there was insufficient proof of deliberation and premeditation. The majority properly notes that there was no substantial evidence of any plan to kill and that "proof of a sudden killing in the course of an argument and struggle between defendants and the attendant would not prove a deliberate and premeditated murder." Yet their opinion raises the possibility of inferring deliberation and premeditation from the testimony of the Somerses, which "suggests that Valencia restrained Casas while Velasquez held him at gun point for a brief period before shooting him." (*Ante*, pp. - [typed opn. pp. 13-14].) The Somerses' observation of that restraint occupied but a few seconds; they saw it first while driving out of the station and immediately sped for help. Their momentary observation seems insufficient to establish premeditation or deliberation in the absence of other proof of plan or motive. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) The Somerses did not see the shooting. The witness Leyva, who did hear a shot, testified it was preceded by a struggle.

The evidence is insufficient unless it supports a rational conclusion that the prosecution proved deliberation and premeditation beyond a reasonable doubt. (*Jackson v. Virginia* (1979) _____ U.S. _____ [99 S.Ct. 2781, 2789; *People v. Reilly* (1970) 3 Cal. 3d 421, 425; *In re Frederick G.* (1979) 96 Cal. App.3d 353, 362-365.) Thus I would supplement the majority's reversal with directions to the trial court (1) to strike the finding of the special circumstance of willful, deliberate, and premeditated murder during the commission of robbery, and (2) to conduct the penalty retrial accordingly.

NEWMAN, J.

ORDER DUE
February 29, 1980

In the Supreme Court of the State of California

Crim. No. 20834

IN BANK

PEOPLE

v.

VELASQUEZ

SUPREME COURT
FILED
FEB. 27, 1980
G.E. BISHEL, Clerk
/s/
Deputy

ORDER DENYING REHEARING

Petitions for rehearing denied.

Clark, J., Richardson, J., and Manuel, J., are of the opinion that the petition should be granted.

/s/
Chief Justice

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on APR 2 3 1980, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Hand Delivered; forty copies)

Clerk, California Supreme Court
3580 Wilshire Boulevard
Second Floor
Los Angeles, California 90010

Clerk, California Court of Appeal,
Second Appellate District
3580 Wilshire Boulevard
Third Floor
Los Angeles, California 90010

Clerk, Los Angeles Superior Court
for the Hon.
111 North Hill Street
Los Angeles, California 90012

Donald L.A. Kerson, Esq.
Deputy State Public Defender
107 South Broadway, Suite 9111
Los Angeles, California 90012

Nick Ramon-Velasquez
Post Office Box B-22314
Tamal, California 94964

I declare under penalty of perjury that the foregoing is true and correct. Executed on APR 2 3 1980 at Santa Monica, California.

Suzanne Newman
(Original signed)